

Exhibit 20



State of California
Office of the Attorney General

Conflict of interest laws are grounded on the notion that government officials owe paramount loyalty to the public, and that personal or private financial considerations on the part of government officials should not be allowed to enter the decision making process. The purpose of this pamphlet is to assist government officials in complying with California's conflict of interest laws and to assist the public and the news media in understanding these laws so that conflict of interest situations can be monitored and avoided.

This pamphlet does not purport to cover all conflict of interest laws. Rather, it focuses on financial conflicts of interest by local and state executive and legislative officials. It does not cover judicial conflicts of interest, the Legislative Code of Ethics, nor the ethical requirements of the state bar.

If you suspect that a government official or a candidate may be involved in a conflict of interest, you can consult this pamphlet to familiarize yourself with the basic requirements of the law and of the enforcement remedies which are available to you. Although this pamphlet will be helpful to both officials and the public, it is no substitute for directly consulting the law in question, or a private or public attorney.

By providing information about the requirements of these laws, the ways in which they have been interpreted and the ways in which they can be enforced, we hope that fewer misunderstandings will result about what is and what is not a conflict of interest. Through an understanding of these laws, government officials should be able to avoid conflict-of-interest situations and members of the public will be better able to determine whether a conflict of interest exists.

Ideas and suggestions for future editions of this pamphlet are welcome and should be addressed to the editors.

Sincerely,

BILL LOCKYER
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CONFLICTS OF INTEREST

OFFICE OF THE ATTORNEY GENERAL

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INTRODUCTION

In preparing this pamphlet, we relied on a variety of legal resources. Obviously, California statutes and appellate court cases were consulted and are cited throughout the pamphlet. While most of the more significant cases are discussed, this pamphlet is not intended to be a compendium of all court cases in this area. In addition, we referred to published opinions and letter opinions issued by this office. Published opinions are cited by volume, page number and year (e.g., 59 Ops.Cal.Atty.Gen. 339 (1979)). Indexed letters or letter opinions are cited by year and page number (e.g., Cal.Atty.Gen., Indexed Letter, No. IL 75-255 (July 21, 1975)). Published opinions are available through law libraries and some attorneys' offices. As a general rule, indexed letters are available only in the Offices of the Attorney General. Copies may be obtained by a request to the editor.

We also referred to the regulations, published opinions and informal advice letters of the Fair Political Practices Commission (hereinafter "FPPC"). The regulations are found in title 2 of the California Code of Regulations in section 18000 et seq. The opinions of the FPPC may be found in publications of Continuing Education of the Bar and are cited by name, year of publication, volume and page number (e.g., *In re Lucas* (2000) 14 FPPC Ops. 15). We occasionally make reference to FPPC informal advice letters which are referred to by name and number (e.g., *Best Advice Letter*, No. A-81-032). Copies of these materials may be obtained from the FPPC, or online through LEXIS-NEXIS or WESTLAW in the CAL-ETH database.

The pamphlet is current through January 1, 2004 with respect to statutes, case law, Attorney General opinions, and opinions and regulations of the FPPC.

If you have specific questions, you should consult an attorney, or in the case of questions concerning the Political Reform Act, the FPPC. In the case of questions concerning the Legislature, its employees or other persons who are subject to Government Code section 8920 et seq., you should contact the Legislative Ethics Committee for the house of the Legislature in question. If you have concerns about potential violations of a conflict-of-interest statute, you should first consult with a representative of the government agency, board or commission which may be affected by the conflict of interest. If you continue to think that a conflict-of-interest violation may exist, you may wish to contact the District Attorney for your county, or other enforcement authority described in the pertinent chapter of this pamphlet.

If you wish to obtain additional copies of this pamphlet, they may be ordered or downloaded via the Attorney General's Home Page, located on the World Wide Web at <http://caag.state.ca.us>. You may also write to the Attorney General's Office, Public Inquiry Unit, P.O. Box 944255, Sacramento, CA 94244-2550 or call us at (800) 952-5225 (for callers within California), or (916) 322-3360 (for callers outside of California); the TTY/TDD telephone numbers are (800) 952-5548 (for callers within California), or (916) 324-5564 (for callers outside of California).

Other relevant pamphlets available to the public produced by the Office of the Attorney General include:

The Brown Act (open meetings for local legislative bodies)
Quo Warranto

ISSUE SPOTTER CHECKLIST

LAW

Financial Conflict of Interest
Political Reform Act
Gov. Code, § 87100 et seq.

Financial Interests in Contracts
Gov. Code, § 1090 et seq.

GUIDEPOSTS

Is a state or local official participating in a government decision?

Does the decision affect an interest in real property or an investment of \$2,000 or more held by the official? Or a source of income to the official of \$500 or more? Or gifts to the official of \$340 or more?

If so, is there a reasonable possibility that the decision will significantly affect any of the interests involved?

Are the official's interests affected differently than those of the general public or a significant segment of the public?

If the answer to these questions is yes, the official may have a conflict of interest and be required to disqualify himself or herself from all participation in that decision. (See ch. I.)

Does a member of a board have a direct or indirect financial interest in a contract being made either by the board or by any agency under the board's jurisdiction?

If so, the member may be subject to criminal sanctions and the contract may be void and any private gain, received by the official under the contract, may have to be returned.

Has any other state or local officer or employee participated in the making of a contract in which the official had a direct or indirect financial interest?

If so, the official may be subject to criminal sanctions and the contract may be void and any private gain received by the official under the contract may have to be returned. (See ch. VI.)

Limitations on State Contracts
Pub. Contract Code, § 10410

Is a state official (other than a part-time board member) involved in an activity, employment or enterprise, some portion of which is funded by a state contract?

Is a state official, while employed by the state, contracting with a state agency to provide goods or services as an independent contractor?

If the answer to any of these questions is yes, a prohibited activity may have occurred. (See ch. VI., sec. B.)

Conflict of Interest Resulting from
Campaign Contributions
Gov. Code, § 84308

Is there a proceeding involving a license, permit or entitlement for use?

Is the proceeding being conducted by a board or commission?

Were the board members appointed to office?

Has any board member received contributions of more than \$250 from the applicant or any other person who would be affected by the decision:

- during the proceeding?
- within the previous 12 months prior to the proceeding?
- within 3 months following a final decision in the proceeding?

If the answer to any of these questions is yes, the board member may have to disqualify himself or herself from participating in the decision. (See ch. III.)

Appearance of Financial
Conflict of Interest
Common Law

Court-made law, based on avoiding actual impropriety or the appearance of impropriety in the conduct of government affairs, may require government officials to disqualify themselves from participating in decisions in which there is an appearance of a financial conflict of interest. (See ch. XII.)

Receipt of Direct Monetary Gain or Loss
Gov. Code, § 8920

Will an officer receive a direct monetary gain or loss as a result of official action?

If an official expects to derive a direct monetary gain or suffer a direct monetary loss by reason of his or her official activity, the officer should disqualify himself or herself from the decision.

However, a conflict does not exist if an official accrues no greater benefit or detriment as a member of a business, profession, occupation or group than any other member. (See ch. XIII.)

Public Reporting of Financial Interests
Political Reform Act
Gov. Code, §§ 87200-87313

Is the official a state or local officer or employee who participates in the making of government decisions?

If so, the official may be required to file a public report disclosing investments, real property, income and gifts. (See ch. II.)

Incompatible Activities
Gov. Code, § 1125 et seq. (local officials);
Gov. Code, § 19990 (state officials)

Is an official using his or her government position or using government information or property in an improper manner?

Has the official's agency or appointing authority adopted an incompatible activities statement?

If the activity has been prohibited by an incompatible activities statement, the official can be ordered to stop the practice and may be disciplined. (See ch. IX regarding local officials, and ch. X regarding state officials.)

Incompatible Offices
Common Law

Does a single official hold two offices simultaneously? (This common law doctrine applies only to public "officers" as opposed to "employees.")

Do the offices overlap in jurisdiction, such that the official's loyalty would be divided between the two offices?

Incompatible Offices

Common Law (continued)

If the answer to each of these questions is yes, the holding of the two offices may be incompatible and the first assumed office may have been forfeited by operation of law. (See ch. XI.)

Transportation, Gifts or Discounts

Cal. Const., art. XII, § 7

Is a state or local official, other than an employee, receiving a gift or discount in the price of transportation from a transportation company? (The prohibition covers inter and intrastate transportation in connection with both government or personal business.)

If the answer to this question is yes, the officer may have forfeited his or her office. (See ch. VIII.)

Former State Officials and Their Former Agencies

Political Reform Act

Gov. Code, §§ 87400-87405

Is a former state administrative official being compensated, by other than the State of California, to appear before any court or state administrative agency, in a judicial or quasi-judicial proceeding?

If so, did the official, while in office, participate personally and substantially in the same proceeding?

If so, the official may be prohibited from appearing in the proceeding. (See ch. IV, sec. B.)

Gov. Code, § 87406

Is a former state official receiving compensation for the purpose of communicating with a state agency within a year of his or her departure from state service? (See ch. IV, sec. C.)

Former State Officials and Their Contracts

Pub. Contract Code, § 10411

Is a former state official contracting with the former agency to provide goods and services?

If the answer to this question is yes, a prohibited activity may have occurred. (See ch. VII, sec. C.)

I.

CONFLICT-OF-INTEREST PROVISIONS UNDER THE POLITICAL REFORM ACT OF 1974

Government Code Section 87100 Et Seq.*

A. OVERVIEW

The Political Reform Act, Government Code section 81000 et seq. (hereinafter "Act"), was enacted by initiative measure ("Proposition 9") in June 1974. It is the starting point in any consideration of conflict-of-interest laws in California. Chapter 7 of the Act (Gov. Code, §§ 87100-87500)¹ deals exclusively with conflict-of-interest situations. The Act also limits the receipt of specified gifts and honoraria, which will be addressed in Section L of this chapter separately from the general disqualification provisions of section 87100.

One of the legislative declarations at the outset of the Act forms the foundation of the conflict-of-interest provisions: "Public officials, whether elected or appointed, should perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them." (§ 81001(b).)

The stated intent of the Act was to set up a mechanism whereby "[a]ssets and income of public officials which may be materially affected by their official actions . . . [are] disclosed and in appropriate circumstances the officials . . . [are] disqualified from acting in order that conflicts of interest may be avoided." (§ 81002(c).)

The Fair Political Practices Commission (hereinafter, the "FPPC") is the agency primarily charged with the responsibility of advising officials, informing the public, and enforcing the conflict-of-interest provisions of the Act.

B. THE BASIC PROHIBITION

Under the Act, public officials are disqualified from participating in government decisions in which they have a financial interest. The Act does not prevent officials from owning or acquiring financial interests that conflict with their official duties nor does the mere possession of such interests require officials to resign from office.

The disqualification provision of the Act hinges on the effect a decision will have on a public official's financial interests. When a decision is found to have the requisite effect, the

*Selected statutory and regulatory materials appear in appendices A (at p. 126), B (at p. 127), C (at p. 129), and D (at p. 159).

¹All section references in this chapter hereafter refer to the Government Code unless otherwise specified.

official is disqualified from making, participating in making, or using his or her official position to influence the making of that decision at any stage of the decisionmaking process.

By establishing a broad, objective disqualification standard, the Act attempted to cover both actual and apparent conflict-of-interest situations between a public official's private interests and his or her public duties. It is not necessary to show actual bias on the part of the official and generally it is not even necessary to show that an official's assets or the amount of his or her income will be affected by a decision in order to trigger disqualification. Other more attenuated effects may also bring about an official's disqualification.

Even though this is a broad disqualification requirement, it is by no means all inclusive. Conflicts arising out of matters other than a financial interest are outside the purview of the Act, e.g., friendship, blood relationship, or general sympathy for a particular viewpoint.

To determine whether a conflict of interest exists under the Act, the FPPC applies an eight-step process.

- STEP 1: Is the individual a public official? (See Section C of this chapter.)
- STEP 2: Is the public official making, participating in making, or influencing a governmental decision? (See Section D of this chapter.)
- STEP 3: Does the public official have one of the six qualifying types of economic interest? (See Section E of this chapter.)
- STEP 4: Is the economic interest directly or indirectly involved in the governmental decision? (See Section F of this chapter.)
- STEP 5: Will the governmental decision have a material financial effect on the public official's economic interests? (See Section G of this chapter.)
- STEP 6: Is it reasonably foreseeable that the economic interest will be materially affected? (See Section H of this chapter.)
- STEP 7: Is the potential effect of the governmental decision on the public official's economic interests distinguishable from its effect on the general public? (See Section I of this chapter.)
- STEP 8: Despite a disqualifying conflict of interest, is the public official's participation legally required? (See Section J of this chapter.)

The answers to these questions will assist you in determining whether a conflict of interest exists. If it does, and no exceptions apply, disqualification is required.

It should be noted at the outset that the Act deals with conflict-of-interest situations on a transactional, or case-by-case, basis. This means that situations must be assessed for possible conflicts of interest in the light of their individual facts. The Act demands continual attention

on the part of officials. They must examine each transaction from the Act's perspective to determine if a conflict of interest exists which triggers the disqualification requirement. (See Section L of this chapter for a discussion of the limits on gifts and honoraria.)

C. STEP 1: IS A PUBLIC OFFICIAL INVOLVED?

By its terms, the Act applies to "public officials." (§ 87100.) As that term is used in the Act, it encompasses not only elected and appointed officials in the ordinary sense of the word, but also any "member, officer, employee or consultant of a state or local government agency." (§ 82048.) The term "public official" also encompasses individuals who hold an office or a position listed in Government Code section 87200, including "other public officials who manage public investments" as that term is defined in FPPC regulations. (Cal. Code Regs., tit. 2, § 18701(b)(1).) Officials of all special purpose districts in the state are included, along with virtually all officers and employees at every level of state and local government. The definition of "public official" also encompasses non-employees who are "consultants" because they perform certain duties much like employees. Note that judges of courts and certain other judicial officials and the State Bar are expressly not included within the disqualification provisions otherwise applicable to all public officials. (§ 82048.) Economic disclosure provisions are, however, applicable to judges and court commissioners, as discussed *post*. (§ 87200.)

Neither the Act nor FPPC regulations specifically defines the terms officer or employee. However, the FPPC has defined the term "member" and "consultant." As to "members," the FPPC has, in keeping with the broad scope of the Act, interpreted the Act to apply to the members of all boards or commissions with decisionmaking authority. (Cal. Code Regs., tit. 2, § 18701(a)(1).) It makes no difference whether such board members are salaried or unsalaried. (*Commission on Cal. State Gov. Org. & Econ. v. Fair Political Practices Com.* (1977) 75 Cal.App.3d 716.) For example, the "public members" on boards and commissions are subject to the provisions of the Act. (Cal. Atty. Gen., Indexed Letter, No. IL 75-58 (April 8, 1975).) The FPPC has determined that a board or commission possesses decisionmaking authority whenever:

1. It may make a final governmental decision (Cal. Code Regs., tit. 2, § 18701(a)(1)(A); *In re Maloney* (1977) 3 FPPC Ops. 69; *In re Rotman* (1987) 10 FPPC Ops. 1; and *In re Vonk* (1981) 6 FPPC Ops. 1.)
2. It may compel or prevent the making of a governmental decision by its action or inaction (Cal. Code Regs., tit. 2, § 18701(a)(1)(B)); or
3. Its recommendations are regularly approved without significant modification (Cal. Code Regs., tit. 2, § 18701(a)(1)(C); *In re Rotman, supra*).

California Code of Regulations, title 2, section 18701, subsection (a)(1)(C) refers to bodies which are technically advisory, but which the FPPC views as decisionmaking, since their "advice" generally is followed by the recipient body. This standard involves the determination of whether the board or commission in question has established a track record of having its recommendations regularly approved. (See *Commission on Cal. State Gov.*

Org. & Econ. v. Fair Political Practices Com., *supra*, 75 Cal.App.3d 716; see also *In re Rotman*, *supra*, [for a discussion of redevelopment project area committees].)

The final category of officials affected by the Act is that of “consultant.” To qualify as a consultant, an individual must either be:

- delegated specified decisionmaking authority; or
- while acting in a “staff capacity,” either participate in the making of a decision or perform the duties of an officer or employee of a government agency.

Examples of the type of delegated decisionmaking authority that may make an individual a consultant include the power to approve a rule or regulation; adopt or enforce a law; issue, deny, or suspend a permit, license or entitlement; or grant agency approval to a contract, plan, or report.

The phrase “staff capacity” is a term of art that is delineated in advice letters of the FPPC. (*Dresser* Advice Letter, No. I-02-022; *Thomas* Advice Letter, No. A-98-185; *Cronin* Advice Letter, No. I-98-155; *Ferber* Advice Letter, No. A-98-118.) Factors to consider in determining whether a person is working in a staff capacity include: whether the duties involve general advice or assistance as opposed to a single or limited number of projects; whether the duties will be completed within a year; and whether the duties are sporadic or on-demand, as opposed to ongoing. (*Dresser* Advice Letter, No. I-02-022.)

Individuals who contract to provide services or advice to a government agency that do not satisfy the criteria set forth in the regulation are not consultants and, therefore, not public officials for purposes of the Act. If an individual is not a public official, no further inquiry is necessary as to the remaining seven steps.

D. STEP 2: IS THE OFFICIAL MAKING, PARTICIPATING IN THE MAKING OF, OR USING HIS OR HER OFFICIAL POSITION TO INFLUENCE THE MAKING OF A GOVERNMENTAL DECISION?

Once it has been determined an individual is a government official, the next step is to determine if the official’s actions are covered. The official’s actions are covered if the official is: (1) making, (2) participating in the making of, or (3) influencing or attempting to influence a decision.

1. Actually Making A Decision

Decision making includes voting on a matter, appointing a person to a position, obligating one’s agency to a course of action on an issue, or entering into a contract for the agency. (Cal. Code Regs., tit. 2, § 18702.1(a)(1)-(4).) Determining not to act in any of those ways is also “making a decision” under the Act. (Cal Code Regs., tit. 2, § 18702.1(a)(5).)

2. Participation In Decision Making

The proscriptions of the Act encompass a broad range of activities beyond the most obvious actions such as voting or contracting, since the language “participate in making . . . a governmental decision” is included in the general prohibition. (§ 87100.) The FPPC has interpreted “participation” to include (1) negotiations without significant substantive review and (2) advice by way of research, investigations, or preparation of reports or analyses for the decision maker, if these functions are performed without significant intervening substantive review. (Cal. Code Regs., tit. 2, § 18702.2.)

Three areas of activity which would otherwise fall within the literal definition of participating in the making of a decision have been expressly excluded.

First, participation does not include actions which are solely ministerial, secretarial, manual, or clerical. (Cal. Code Regs., tit. 2, § 18702.4(a)(1).) These functions are excluded from the definition of participation because they do not involve policy making judgment or discretion. Since the official performing these activities has no substantive role in the decision, there is no fear that the decision will be affected as a result of his or her financial interests. Accordingly, there is no purpose in disqualifying the official from performing these functions.

Second, a public official may appear before his or her own public agency for the purpose of representing his or her personal interests. (Cal. Code Regs., tit. 2, § 18702.4(a)(2) and (b)(1).) The purpose of this exclusion is to allow citizens to exercise their constitutional rights to communicate with their government. However, the exclusion is limited in that it applies to situations in which the decision will solely affect the official’s personal interests (e.g., real property or business solely owned by the official or members of his or her immediate family). To the extent that there are other persons who have the same interest, e.g. other stockholders in a corporation, the official with the conflict is disqualified from addressing his or her agency in any way on that issue. With respect to appearing before one’s own agency or any other agency over which the official’s agency has appointment authority or budgetary control, see subsection 3, Influencing Decision Making, below, and Cal. Code Regs., tit. 2, § 18702.3(a).

Third, by necessity, participation also does not include actions by a public official with regard to his or her compensation for services or the terms or conditions of his or her employment or contract. (Cal. Code Regs., tit. 2, § 18702.4(a)(3).)

3. Influencing Decision Making

The Act, in section 87100, prohibits a public official from “in any way attempting to use his or her official position to influence a governmental decision” when the official has a financial interest. The addition of this final category of prohibited activity was intended to ensure that public officials do not act indirectly to affect their private economic interests by utilizing their official status or activities. It specifically

includes attempting to affect any decision within the official's own agency or any agency appointed by or subject to the budgetary control of his or her agency. (Cal. Code Regs., tit. 2, § 18702.3(a).) Contacts with agency personnel or other attempts to influence on behalf of an official's business entity, client or customers are prohibited. (Cal. Code Regs., tit. 2, § 18702.3(a).)

The FPPC regulations specifically exempt oral or written communications by an official, made as any other member of the general public, solely to represent his or her personal interests. Personal interests include: an interest in real property; or a business entity which is wholly owned by the official or members of his or her immediate family; or a business entity over which the official or the official and his or her spouse exercise sole control. (Cal. Code Regs., tit. 2, § 18702.4(b)(1)(A)-(C).) Communications with the media or general public, negotiation with one's own agency regarding compensation, and specific written and oral architectural presentations also are exempt from coverage. (Cal. Code Regs., tit. 2, § 18702.4(b)(2)-(5).)

In addition to the general provisions of the Act, the Legislature created a special prohibition for state officials, including members of all state advisory bodies. Section 87104 specifically provides that no state official:

- shall for compensation act as agent or attorney for any other person;
- before his or her state agency;
- if the appearance or communication is made for the purpose of influencing a contract, grant, loan, license, permit or other entitlement for use.

The prohibition contained in section 87104 is not applicable to local government officials unless they serve on a state body or state advisory body. However, the disqualification requirement contained in section 87100 generally would achieve the same result since local public officials may not make, participate in making, or use their official position to influence the making of government decisions which materially affect their sources of income. (Note: Section 87104 covers all state advisory bodies, whereas section 87100 covers only those advisory bodies with decisionmaking authority.) (See Cal. Code Regs., tit. 2, § 18701(a)(1)(C).)

When a decision is not before the official's own agency, nor an agency over which the official's agency has budgetary control, the official is attempting to use his or her official position to influence the decision if, for the purpose of influencing the decision, the official purports to act on behalf of his or her agency in communications with any official of another agency. Such actions include the use of official stationery. (Cal. Code Regs., tit. 2, § 18702.3(b).)

As noted at the outset (Chapter I, Section B, The Basic Prohibition, *ante*), several elements must be present for a conflict of interest to exist. Having discussed who is a covered public official and the types of actions (e.g., making decisions), that are

covered, we must still inquire: does the official have a statutorily defined economic interest; is it reasonably foreseeable that his or her governmental decision could affect that interest materially; and is that effect distinguishable from the effect of that decision on the public generally. If the answer to all three inquiries is yes, the official probably has a disqualifying financial interest under the Act.

E. STEP 3: DOES THE PUBLIC OFFICIAL HAVE ONE OF THE SIX QUALIFYING TYPES OF ECONOMIC INTEREST?*

Many variables come into play in determining when an official has a financial interest in the outcome of a decision sufficient to require the official to disqualify himself or herself from action on the matter. (For more discussion of economic interests and their required disclosure under the Act, see Chapter II of this pamphlet.)

Specifically, the Act addresses six kinds of interests: (1) investments in business entities, (2) interests in real property, (3) sources of income, (4) sources of gifts and their agents or intermediaries, (5) positions with business organizations, and (6) personal finances of the official and the official's immediate family. (§ 87103(a)-(e).) In the case of each category (except the fifth), the Act specifies the minimum amount of holdings, income or gifts which must exist before a qualifying interest is created. An official with a holding, income or gift which is less than the minimum, need not be concerned with the Act's disqualification provisions since such property or income does not constitute an "interest" under the Act. But a holding, income or gift equal to or greater than the minimum value creates the potential for a "material financial effect" on the official's economic interests, which affects the official's interest differently from the way the decision affects the public generally.

1. Investments In Business Entities

With regard to investments in a "business entity," any direct or indirect investment of \$2,000 or more creates an "interest" for the official. "Business entity" is defined in the Act and essentially means an organization that is operated for profit. (§ 82005.) Business entities include corporations, partnerships, joint ventures, sole proprietorships, and any other type of enterprise operated for a profit. Investments do not include bank accounts; interests in mutual funds, money market funds or insurance policies; or government bonds or securities. (§ 82034.)

By opinion, the FPPC defined the investment relationship between limited and general partners. (*In re Nord* (1983) 8 FPPC Ops. 6.) If the limited partnership is "closely held" as defined by statute, a limited partner is deemed to have an "investment" in his or her general partner.

When the limited partner has such an investment, he or she must disqualify with respect to decisions affecting the general partner personally or through business entities controlled by the general partner. However, limited partners do not have an investment in other limited partners.

*Selected statutory materials appear in appendix B (at p. 127).

The FPPC also has defined the economic relationship between parents, subsidiaries and otherwise related business entities. An official who has an economic interest in one such entity is also deemed to have an interest in all other such entities. A parent corporation is one that has a 50 percent or greater ownership interest in a subsidiary corporation. (Cal. Code Regs., tit. 2, § 18703.1(d)(1).) One business entity is related to another business entity, if the one business entity or its controlling owner is a controlling owner of the other business entity, or if management and control is shared between the entities. (Cal. Code Regs., tit. 2, § 18703.1(d)(2).)

“Indirect investment” is defined to include investments owned by an official’s spouse (as either separate or community property), by dependent children, or by someone else on behalf of the official, i.e., a trust arrangement. (§ 82034; § 87103; Cal. Code Regs., tit. 2, §§ 18234, 18235.) Indirect investment also includes any investments held by a business entity in which the official, his or her spouse, and their dependent children collectively have a 10 percent or greater interest. (§ 82034.)

In Cal.Atty.Gen., Indexed Letter, No. IL 76-35 (February 13, 1976), this office advised that a member of the South Central Regional Coastal Commission had a conflict of interest and should disqualify from participation, where the official owned the requisite amount of stock in a corporation which was party to an appeal to the state commission. The stock had been placed in trust with the official’s spouse and children as income beneficiaries. The commissioner was trustor. The official thus had both an investment and an income interest which gave rise to a “financial interest” under the Act. (See also, *In re Biondo* (1975) 1 FPPC Ops. 54.)

2. Interests In Real Property

An official has an “interest in real property” when the official, spouse or dependent children have a direct or indirect equity, option, or leasehold interest of \$2,000 or more in a parcel of property (e.g., ownership, mortgages, deeds of trusts, options to buy, or joint tenancies) located in, or within two miles of, the geographical jurisdiction of the official’s agency (e.g., within two miles of city boundaries for city officials). (§§ 82033, 82035.) It should be noted that the \$2,000 threshold applies to the value of the official’s interest, based upon the fair market value of the property itself. Special provisions exist with respect to the disclosure of, or disqualification in connection with, leasehold interests. (See § 82033; Cal. Code Regs., tit. 2, §§ 18233, 18707.9(b) and 18729; *In re Overstreet* (1981) 6 FPPC Ops. 12.)

3. Source Of Income

A public official has an economic interest in any source of income that is either received by or promised to the official and totals \$500 or more in the 12 months prior to the decision in question. Income includes loans, other than loans from commercial lending institutions in the ordinary course of business made on terms available to the general public. (§ 87103(c).) The FPPC regulations make it clear that a conflict of interest results whenever either the amount or the source of an official’s income is affected by a decision. (Cal. Code Regs., tit. 2, §§ 18704.5, 18703.3(a), 18705.3,

18705.5(a)); see also *Witt v. Morrow* (1977) 70 Cal.App.3d 817.) Detrimental as well as positive effects on the amount or source of income can create a conflict of interest. For example, a decision which foreseeably will materially affect an official's employer would necessitate disqualification even if the amount of income to be received by the official were not affected. (*In re Sankey* (1976) 2 FPPC Ops. 157.) (See discussion *post* regarding affects on an official's personal finances.)

Income generally includes earned income such as salary or wages; gifts; reimbursements of expenses; proceeds from sales, regardless of whether a profit was made; certain loans; and monetary or nonmonetary benefits, whether tangible or intangible. (§ 82030(a).) Income also includes the official's community property interest in his or her spouse's income (the official would meet the \$500 threshold if the spouse received \$1,000 of income), but does not include dependent children's income. (*In re Cory* (1976) 2 FPPC Ops. 48.) (Note: This differs from treatment of dependent children's interests in a business entity or in real property as previously discussed.)

An elected officer may not accept personal loans of \$500 or more unless the officer complies with specified requirements set forth in section 87461. (See also section 87460 which prohibits certain high-level public officials from receiving personal loans from persons who contract with or are employed by the official's agency.)

Common exclusions from the definition of income include: campaign contributions; government salaries and benefits; certain types of payments from nonprofit organizations; informational materials; inheritances; interest received on time deposits; dividends or premiums from savings accounts; and dividends from securities registered with the Securities and Exchange Commission. (§ 82030(b).) With the exception of gifts, the definition of income does not include payments from a source located outside of the official's jurisdiction that does not do business in the jurisdiction, does not plan to do so, and has not done so within the past two years. (§ 82030(a).)

This office interpreted the income provisions of the Act in Cal.Atty.Gen., Indexed Letter, No. IL 75-249 (November 10, 1975) and concluded that no conflict of interest existed where the wife of a deputy superintendent of schools was a supervisor in the same county. Her community property share of her husband's salary from the county was not "income" within the meaning of the Act because it was a government salary specifically exempted by section 82030(b)(2). This exemption does not apply to a decision to hire, fire, promote, demote or discipline the spouse, or to set a salary for the spouse that is different from salaries paid to other employees in the same job classification or position. (Cal. Code Regs., tit. 2, § 18705.5(b).)

For purposes of disqualification, the FPPC determined that income from a former employer does not create a conflict of interest if (1) the income was accrued or received in its entirety before the official assumed his or her public position; (2) it was received in the normal course of employment; and (3) there was no expectation on the official's part that the official would resume employment with the same employer. (Cal. Code Regs., tit. 2, § 18703.3(b).)

4. Source Of Gifts

Although gifts are included in the definition of income (§ 82030(a)), a separate disqualification provision for gifts was placed in section 87103(e). As is the case with income, this section covers gifts received by or promised to the public official in the 12-month period. In addition to donors, this section also applies to persons who act as agents or intermediaries in the making of gifts.

Section 87103(e) provides that a public official has a financial interest in the donor of gifts aggregating \$250 or more in the 12 months prior to the decision in question. However, the Legislature has provided that the \$250 threshold be adjusted on a biennial basis to correspond with the gift limit established in section 89503. For the years 2003 and 2004 the disqualification threshold has been raised to \$340. (Cal. Code Regs., tit. 2, § 18940.2.)

(See Section L of this chapter for a discussion of the definition of a gift, the valuation of gifts, and limitations on the receipt of gifts and honoraria.)

Ordinarily, the receipt of property or services by a public official without the payment of equal consideration constitutes a gift to the public official. However, under limited circumstances, a gift is made to a public agency rather than to a public official. (Cal. Code Regs., tit. 2, § 18944.2.) In order for a gift to qualify as a gift to an agency rather than an official, four criteria must be satisfied. First, the agency must receive and control the payment. (The payment can be monetary or non-monetary.) Second, the payment must be used for official agency business. Third, although the donor may identify a specific purpose for use of the gift, the agency in its sole discretion must determine the specific official or officials who will use the payment. Fourth, the agency must memorialize receipt of the payment in a written public record. (Cal. Code Regs., tit. 2, § 18944.2.) This writing must establish that the gift was made to the public agency reciting how the first three criteria were satisfied. Further, it must identify the donor and the officials receiving or using the payment, describe the use of the payment, and set forth the nature and amount of the payment. This writing must be filed within 30 days with the person charged with the responsibility of maintaining the agency's statements of economic interests. In addition to the requirements imposed by the FPPC, the Department of Finance has established procedures that state agencies must follow when accepting gifts. (77 Ops.Cal.Atty.Gen. 70 (1994).)

There is a partial exception for specified gifts made to public colleges and universities. (Cal. Code Regs., tit. 2, § 18944.2(b).) In addition, special procedures have been adopted concerning the receipt by an agency of passes or tickets for events. (Cal. Code Regs., tit. 2, § 18944.1.)

5. Business Positions

An official has an economic interest in any business entity in which he or she is an officer, director, employee, or holds any business position, irrespective of whether he or she has an investment in or receives income from the entity.

6. Personal Financial Effect

An official has an economic interest in his or her own finances and those of his or her immediate family (spouse, dependent children -- §§ 87103; 82029; Cal. Code Regs., tit. 2, § 18703.5). If it is reasonably foreseeable that a decision will have a financial effect on the official or a member of his or her immediate family that is distinguishable from the decision's effect on the public generally, then disqualification is required whenever the magnitude of the effect will be "material." (§ 87103; Cal. Code Regs., tit. 2 § 18703.5.) A financial effect includes increasing or decreasing the personal expenses, income, assets, or liabilities of the official or members of the official's immediate family. (Cal. Code Regs., tit. 2 § 18703.5.) This does not include effects on the official's real property interests or investment interests. Nor does it include an official's governmental salary, per diem, or benefits, unless the decision is to hire, fire, promote, demote, suspend without pay or other disciplinary action against the official or his or her immediate family member, or to set salary for the official or an immediate family member that is different from salaries paid to other employees of the same agency in the same job classification.

F. STEP 4: IS THE ECONOMIC INTEREST DIRECTLY OR INDIRECTLY INVOLVED IN THE GOVERNMENTAL DECISION?

The standard applied to determine whether a decision will have a material financial effect on the public official's interest depends upon whether the interest is directly or indirectly involved. If the interests are directly involved, materiality is generally presumed and the public official usually will have to disqualify himself or herself from the decision. If the interests are only indirectly involved, generally a graduated set of monetary thresholds will be applied to determine the material financial effect. (Cal. Code Regs., tit. 2, § 18704.1(b).)

1. Direct Involvement

A person or business entity is directly involved in a decision before an official's agency if the person or entity is named as a party to the proceeding conducted by the official's agency or initiates the proceeding by filing an application, claim, appeal or similar request, or is otherwise the subject of a proceeding. (Cal. Code Regs., tit. 2, § 18704.1(a).)

Subsection (b) of regulation 18704.1 generally requires disqualification when a source of income or gifts to the official, or a business entity in which the official has an investment or holds a position, is directly involved in a governmental decision before the official's agency. However, there is an exception for public officials who hold an investment worth \$25,000 or less in a Fortune 500 company, or in a company qualified for listing on the New York Stock Exchange. Public officials with such interests may apply the standards for indirectly involved interests even though the interest in question is in fact directly involved. (Cal. Code Regs., tit. 2, § 18705.1(b)(2).)

In addition, FPPC regulations apply the "direct involvement" standard to decisions in which there is a "nexus" between the purpose for which the official receives income and the governmental decision. (Cal. Code Regs., tit. 2, § 18705.3(c).) If a person is paid to promote or advocate the policies or position of an individual or group, the official may not then participate in a governmental decision that involves that policy or position. Under the regulation, a "nexus" exists if the official receives income in his or her private capacity to achieve a goal or purpose that would be achieved, defeated, aided, or hindered by the governmental decision. (Cal. Code Regs., tit. 2, § 18705.3(c).)

The FPPC has advised that the executive director of an organization, who as a part of his or her duties advocates pro-growth positions endorsed by his or her organization, was disqualified from participating in any decisions in his or her capacity as a member of a board that would advance or inhibit the accomplishment of the organization's goals. (*Best Advice Letter*, No. A-81-032.)

California Code of Regulations, title 2, section 18704.2, subsection (a) clarifies when a governmental decision directly involves a public official's interest in real property. A public official is directly involved if the property in which the official has the interest is the subject of the decision that is before the official's agency or if the official's property is located within a 500-foot radius of the subject property. The regulation expressly provides that property is the subject of a decision if the decision involves the zoning, annexation, sale, lease, actual or permitted use of, or taxes or fees imposed on the property in which the official has an interest. It also includes major redevelopment decisions involving establishment or amendment of the redevelopment plan where the official owns property in the redevelopment area. (*Downey Cares v. Downey Community Development Com.* (1987) 196 Cal.App.3d 983.)

An official is also directly involved in a governmental decision that involves the construction of or improvements to public facilities such as water, sewer or streets, that will result in the property receiving new or substantially improved services. (Cal. Code Regs., tit. 2, § 18704.2(a)(6).)

When leasehold property in which a public official has an interest is directly involved in the governmental decision, it is presumed that the decision will have a material financial effect upon the official's interests. This presumption may be rebutted by

proof that it is not reasonably foreseeable that the governmental decision will have an effect on any of the various factors affecting the value of the leasehold. (Cal. Code Regs., tit. 2, § 18705.2(a)(2).)

California Code of Regulations, tit. 2, section 18704.5 provides that whenever a decision will affect the expenses, income, assets or liabilities of the official or his or her immediate family by any amount the official's personal finances are directly involved in the decision.

Finally, there is one overriding exception to the disqualification requirement where a public official's economic interests are directly involved -- the official need not disqualify himself or herself if it can be shown that the governmental decision will have no financial effect on the official or his or her economic interests. (Cal. Code Regs., tit. 2, §§ 18705(c); 18705.1-18705.5.)

To recap, the issue of direct versus indirect involvement will determine the materiality standard to be applied. When the interests of the public official are directly involved, materiality is generally presumed and disqualification required unless the official can demonstrate that the decision will have no financial effect on the official or his or her interests. If the public official's interests are indirectly involved, materiality is not presumed, but rather is frequently measured by a set of graduated thresholds. In the case of business entities, these are primarily tied to the financial size of the entity affected.

2. Indirect Involvement

Interest that are indirectly involved must be evaluated in accordance with step 5 discussed below.

G. STEP 5: WILL THE GOVERNMENTAL DECISION HAVE A MATERIAL FINANCIAL EFFECT ON THE PUBLIC OFFICIAL'S ECONOMIC INTERESTS?*

1. Directly Involved Interests

As discussed in Step 4 above, materiality generally is presumed when the public official's economic interests are directly involved in the governmental decision unless the official can demonstrate that the decision will have no effect on the official or his or her interests. (Cal. Code Regs., tit. 2, § 18705(a).)

However, in the case of a personal financial effect on the finances of the official or a member of the official's immediate family, even if the official's interest is directly involved in the decision the effect must be at least \$250 in a 12-month period in

*Selected regulations appear in appendix C (at p. 129).

order to be considered “material” and require the official to disqualify. (Cal. Code of Regs., tit. 2 §§ 18704.5, 18705(a)(5), 18705.5(a).)

2. Indirectly Involved Interests

When an interest is indirectly involved, there is no presumption of materiality; rather, the public official must find and apply the applicable materiality regulation with its graduated thresholds to the governmental decision in question. (Cal. Code Regs., tit. 2, §§ 18705-18705.5.)

a. Business Entities

Materiality is present if the decision will:

- have the specified effects on the gross revenues, assets, or liabilities of the business entity in which the investment is held, or
- permit the business entity to avoid the expenditure of a designated amount of funds. (Cal. Code Regs., tit. 2, § 18705.1.)

Whether an effect on a business entity will be considered material depends on the financial size of the business entity. (Cal. Code Regs., tit. 2, § 18705.1(c).) For example, an effect of only \$20,000 on the gross revenues or assets is material to a small business (Cal. Code Regs., tit. 2, § 18705.1(c)(4)), while an effect of less than \$10 million on the gross revenues or assets may not be material on a Fortune 500 company (Cal. Code Regs., tit. 2, § 18705.1(c)(1).)

b. Real Property

As previously noted when the decision involves another’s real property located within a 500-foot radius of the official’s property, the official’s interest is presumed to be directly involved in the decision. Thus, a material financial effect is presumed unless the decision will have no financial effect on the official’s property. (Cal. Code Regs., tit. 2, §§ 18704.2(a) and 18705.2(a)(1).)

However, when a decision affects another’s property that is more than 500 feet from the official’s property, the official’s interest is only indirectly involved in the decision. When the official’s interest is indirectly involved, the regulation provides that the effect of the decision is presumed not to be material. This presumption may be overturned if it can be shown that the official’s property will be materially affected. Factors leading to such a conclusion include, among others, circumstances where the decision affects:

(1) the development potential of the property; (2) use of the property; and (3) character of the neighborhood. (Cal. Code Regs., tit. 2, § 18705.2(b)(1).)

A public official's leasehold interests that are indirectly involved in a governmental decision are presumed not to be material. However, where specified factors are present, the presumption may be rebutted. (Cal. Code Regs., tit. 2, § 18705.2(b)(2).) The decision may be deemed material if it affects: (1) the legally allowable use where the tenant has the right to sublease; (2) the use or enjoyment of the property; (3) the rent by more than 5%; or (4) the termination date of the lease.

c. Nonprofit Entity

California Code of Regulations, title 2, section 18705.3, subsection (b)(2) defines materiality in the context of a nonprofit entity that is indirectly affected by a decision. Like the regulation governing effects on business entities, it establishes a series of criteria based upon the monetary size of the nonprofit entity.

d. Individuals

California Code of Regulations, title 2, section 18705.3, subsection (b)(3) establishes standards for determining materiality when a governmental decision will have a material effect on an individual who is indirectly involved and who is a source of income or gift to an official. The regulation establishes a materiality threshold of \$1,000 and for real property incorporates the standards in California Code of Regulations, title 2, section 18705.2, subsection (b).

H. STEP 6: IS IT REASONABLY FORESEEABLE THAT THE ECONOMIC INTEREST WILL BE MATERIALLY AFFECTED?

An official is not required to disqualify from participating in a decision unless the effects of the decision that give rise to the conflict of interest are reasonably foreseeable under all of the circumstances at the time the decision is made. The concept of foreseeability hinges on the specific facts of each individual case. For the effect of a decision to be foreseeable, it need not be either certain or direct. However, the possibility that the contemplated effects will in fact occur must be more than merely conceivable. It must appear that there is a substantial likelihood, based on all the facts available to the official at the time of the decision, that the effects that would bring about the conflict of interest will occur. (Cal. Code Regs., tit. 2, § 18706; *Smith v. Superior Court of Contra Costa Co.* (1994) 31 Cal.App.4th 205; *Downey Cares v. Downey Community Development Com.*, *supra*, 196 Cal.App.3d 983; *Witt v. Morrow*, *supra*, 70 Cal.App.3d 817.)

In *Downey Cares v. Downey Community Development Com.*, *supra*, 196 Cal.App.3d 983, the court analyzed the issue of foreseeability in the context of an ordinance amending a city's redevelopment plan. Plaintiffs brought suit contending that the amendment was invalid

because a council member's property and business would be foreseeably affected by the amendment. The court stated at pages 991-992:

In determining the reasonably foreseeable effects of the adoption of the redevelopment plan, the court may justifiably consider that the very purpose of redevelopment is to improve the property conditions in the redevelopment area. (Health & Saf. Code, § 33037.) [Fn. omitted.] The fact that it might be possible to conceive of specific redevelopment projects which might fail to affect Mr. Santangelo's property and business does not show the trial court's decision was wrong. The test is whether it was reasonably foreseeable that the adoption of the plan would have a material financial effect on Santangelo's property and business, and we find the trial court's decision supported by reasonable inferences and the record.

. . . Not only did Mr. Santangelo own a valuable property in the amended area which was the site of a real estate business employing 32 persons of which he was the sole proprietor, and own 4 parcels of real property in the original redevelopment area, but also several of his properties were specifically mentioned in reports as possible areas for specific projects. [Fn. omitted.]

In an opinion to the Marin Municipal Water District (*In re Thorner* (1975) 1 FPPC Ops. 198), the FPPC discussed foreseeability in the context of granting exceptions to the county's water moratorium. In the case of one district director, the FPPC concluded that it was not foreseeable that a decision on the moratorium would affect the director's husband's private employer. The FPPC based its decision on the fact that her husband was on salary rather than commission, he was working outside the county, and his employer had only done one project in the county within the past 10 years.

However, another director, who was part owner of a building supply company that was in competition with other firms in the county, was found to have a possible conflict of interest, since there was a reasonable possibility (hence, it was reasonably foreseeable) that decisions on exemptions from the moratorium might either affect the amount of his or her own income or have an effect on his or her business entity.

In *In re Gillmor* (1977) 3 FPPC Ops. 38, the FPPC interpreted the foreseeability requirement in the context of property owned by Gillmor near a redevelopment area.

. . . Thus, it is intended and anticipated that redevelopment will have a financial impact on real property and business located in and near the redevelopment zone.

In the present case, we think it is 'reasonably foreseeable' that these types of positive financial consequences will occur if the property in question is rezoned and the senior citizens' housing complex constructed. . . .

In Cal. Atty. Gen., Indexed Letter, No. IL 75-58 (April 8, 1975), this office concluded that the decisions of a state board regulating certain advertising would not materially affect a board member's source of income. In that case, the board member, as a condition of his contract with a television station, recorded a series for an industry, some of whose advertising was regulated by the board. This office reasoned that it was too remote and speculative that a decision to regulate the advertising of a particular industry would materially affect the television station which was the board member's source of income.

By regulation, the FPPC has set forth some guidelines to assist in determining whether a particular decision's effects are "reasonably foreseeable." (Cal. Code Regs., tit. 2 § 18706.) The regulation sets forth certain factors to be considered in making the determination.

- The extent to which the official or the official's source of income has engaged, is engaged, or plans on engaging in business activity in the jurisdiction.
- The market share held by the official or the official's source of income in the jurisdiction.
- The extent to which the official or the official's source of income has competition for business in the jurisdiction.
- The scope of the governmental decision in question.
- The extent to which the occurrence of the material financial effect is contingent upon intervening events (not including future governmental decisions by the official's agency, or any other agency appointed by or subject to the budgetary control of the official's agency).

In addition to the foregoing factors, the regulation expressly provides that possession of a real estate sales or brokerage license, or any other professional license, without regard to the official's business activity or likely business activity, does not in itself make a material financial effect on the official's economic interest reasonably foreseeable.

I. STEP 7: IS THE EFFECT OF THE GOVERNMENTAL DECISION ON THE PUBLIC OFFICIAL'S ECONOMIC INTERESTS DISTINGUISHABLE FROM ITS EFFECT ON THE GENERAL PUBLIC?

If an official has a financial interest within the meaning of the Act and the governmental decision in question will foreseeably have a material effect on that interest, the official still may not be disqualified from participating in the decision. One last variable must be considered: whether the decision will affect the official's economic interest differently than it does those of the "public generally." (§ 87103.) If the official is participating in a decision on an issue that will affect the general public's financial interests in the same manner as it does the official's own, the fact that it is affecting materially the official's interest does not create a conflict of interest for the official.

The policy supporting this provision is that an official probably is not reacting to his or her financial interests to the detriment of the community that the official represents when the official's interests are in harmony with those of the general public or a significant segment of it. Thus, there is no "conflict" when there is a harmony or confluence of interests with a significant segment of the members in the jurisdiction.

Recognizing that no decision will affect every member of the public in the same way, the FPPC, by regulation has defined the term "public generally" to mean a "significant segment" of the public. (Cal. Code Regs., tit. 2, §§18707 and 18707.1.) For a conflict of interest to be avoided, the official's interest must be affected in substantially the same manner as the interests of all members of the group that is determined to constitute a significant segment. If the interests of some members of the significant segment will be affected differently from the interests of others, the official may not avoid disqualification.

In general, the FPPC requires a group of people to be large in number and heterogeneous in nature for it to qualify as a significant segment of the public. (*In re Overstreet*, *supra*, 6 FPPC Ops. 12; *In re Ferraro* (1978) 4 FPPC Ops. 62.) To the extent it appears to be a narrow, special interest group, it generally would not qualify as a significant segment. (Cal. Atty. Gen., Indexed Letter, No. IL 75-58 (April 8, 1975); *In re Brown* (1978) 4 FPPC Ops. 19; *In re Legan* (1985) 9 FPPC Ops. 1.)

The Fair Political Practices Commission has established specific percentage and numerical thresholds for determining when a group of people constitute a significant segment of the general public, as summarized below:

- Ten percent or more of the population in the jurisdiction of the official's agency or the district that the official represents. (Cal. Code Regs., tit. 2, §18707.1(b)(1)(A)(i).)
- Ten percent or more of all property owners or homeowners in the jurisdiction of the official's agency or the district that the official represents. (Cal. Code Regs., tit. 2, §18707.1(b)(1)(B)(i).)
- Twenty-five percent of all businesses (or 2,000 businesses) in the jurisdiction of the agency or the district which the official represents, so long as the businesses are comprised of other than a single industry, trade or profession. (Cal. Code Regs., tit. 2, §18707.1(b)(1)(C).)
- Five thousand residents of the jurisdiction. (Cal. Code Regs., tit. 2, §18707.1(b)(1)(A)(ii).)
- Five thousand property owners or homeowners in the jurisdiction of the official's agency. (Cal. Code Regs., tit. 2, §18707.1(b)(1)(B)(ii).)

- With respect to an elected state officer, an industry, trade or profession is a significant segment of the general public; with respect to any other elected official, an industry, trade or profession that is predominant in the jurisdiction or district that the official represents is a significant segment of the general public. (Cal. Code Regs., tit. 2, § 18707.7.)

Under limited circumstances, a member of a board or commission may be appointed to represent the interests of a specific economic group or interest. In those circumstances, the group or interest constitutes a significant segment of the general public. (Cal. Code Regs., tit. 2, § 18707.4.) Accordingly, so long as the official's interests are affected in substantially the same manner as those of the group or interest in question, the conflict of interest is vitiated and the official may participate in making the decision. In order for a member to represent a specific economic group or interest, all of the following criteria must be met:

- The statute, ordinance, or other provision of law that creates or authorizes the creation of the board or commission contains a finding and declaration that the persons appointed to the board or commission are appointed to represent and further the interests of the specific economic interest.
- The member is required to have the economic interest the member represents.
- The board's or commission's decision does not have a material financial effect on any other economic interest held by the member, other than the economic interest the member was appointed to represent.
- The decision of the board or commission will financially affect the member's economic interest in a manner that is substantially the same or proportionately the same as the decision will financially affect a significant segment (50% or more) of the persons the member was appointed to represent.

(Cal. Code. Regs., tit. 2, § 18707.4.)

If the statute creating the board or commission does not expressly provide that the member represents the industry, trade or profession and hold the economic interest, it may be inferred that the legislative body impliedly authorized such representation based upon the language of the enabling provision of law, the nature and purposes of the program, legislative history, and any other relevant circumstances. (Cal. Code Regs., tit. 2, § 18707.4(b).)

In addition to the foregoing, the FPPC has adopted special rules interpreting the "public generally exception" in connection with states of emergency (Cal. Code Regs., tit. 2, § 18707.6); and rate making decisions, including those by landowner/water districts (Cal. Code Regs., tit. 2, § 18707.2). Notwithstanding the specific thresholds established in the regulation, exceptional circumstances may nevertheless justify application of the "public generally exception." (Cal. Code Regs., tit. 2, § 18707.1(b)(1)(E).)

Section 87103.5 provides a special interpretation of the “public generally exception” that addresses specific problems concerning retailers in small communities. (See Cal. Code Regs., tit. 2, § 18707.5(b) for numerical thresholds.)

To summarize, if a public official’s financial interests will be affected in substantially the same manner as all members of the public generally, or a significant segment thereof, no conflict of interest exists.

J. STEP 8: DESPITE A DISQUALIFYING CONFLICT OF INTEREST, IS THE PUBLIC OFFICIAL’S PARTICIPATION LEGALLY REQUIRED?

There is an exception in the Act itself to the general prohibition against an official’s participation in decisionmaking when a financial conflict of interest exists. The exception applies when the individual public official involved must act in order that a decision be made or official action be taken. Under such circumstances, and because of the necessity that government continue to function, the official may proceed despite the conflict, after following certain prescribed procedures. (Cal. Code Regs., tit. 2, § 18708.) The exception expressly does not include the situation in which the official’s vote is merely needed to break a tie. (§ 87101.) This exception is similar to, but is different in several important respects from, the common law rule of necessity.

The legally-required-participation provision has been narrowly construed by this office. In 58 Ops.Cal.Atty.Gen. 670 (1975), this office advised that participation is legally required under the Act (and therefore the exception is applicable) only when the official is faced with the isolated, nonrecurring situation involving a conflict of interest. In reaching this conclusion, this office relied on Government Code section 81003 which provides, “[t]his title should be liberally construed to accomplish its purposes.” If the exception were broadly construed, the central purpose of the Act could be vitiated.

FPPC regulations provide that an official is “legally required to make or to participate” within the meaning of this section only if there is no reasonable alternative manner of decisionmaking. (Cal. Code Regs., tit. 2, § 18708(a).) In determining what is a “reasonable” alternative, the purposes and terms of the statute authorizing the decision must be examined. (Cal. Code Regs., tit. 2, § 18708(a); *Affordable Housing Alliance v. Feinstein* (1986) 179 Cal.App.3d 484; *Brown v. FPPC* (2000) 84 Cal.App.4th 137.) The regulations promulgated by the FPPC detail several steps to be taken by officials who wish to exercise the exception. (Cal. Code Regs., tit. 2, § 18708(b).) Initially, the official must disclose the existence and nature of the conflicting personal financial interest in the outcome of the particular action involved and make it a matter of public record. The official is prohibited from using his or her official position to influence any other public official with regard to the matter. Also, for the record, the official must state exactly why there is no alternative route by which action can be taken. And finally, the official must limit his or her participation to action that is legally required. (Cal. Code Regs., tit. 2, § 18708(b) and (c).) These steps must be closely adhered to in order for the action to be valid. (See *Kunec v. Brea Redevelopment Agency* (1997) 55 Cal.App.4th 511.)